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3 **UNITED STATES DISTRICT COURT**
4 **DISTRICT OF ALASKA**
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7 **ESTATE OF JOSEPH MURPHY,**

8 **Plaintiff,**

9 **vs.**

10 **STATE OF ALASKA, DEPARTMENT OF**
11 **CORRECTIONS, *et al.*,**

12 **Defendants.**
13

1:17-CV-00010 JWS

ORDER AND OPINION

[Re: Motion at docket 53]

14 **I. MOTION PRESENTED**

15 At docket 53 plaintiff Estate of Joseph Murphy ("Plaintiff") asks the court to
16 conduct an *in camera* review of certain personnel and disciplinary records of defendant
17 Jill Robinson ("Robinson"). Robinson responded at docket 68. Plaintiff replies at
18 docket 74. Oral argument was not requested and would not be of assistance to the
19 court.

20 **II. BACKGROUND**

21 Joseph Murphy ("Murphy") was sent to the Lemon Creek Correctional Center
22 ("Lemon Creek") from Bartlett Regional Hospital on August 13, 2015, to be temporarily
23 detained for alcohol detoxification and suicide monitoring pursuant to AS 47.37.170.
24 Early the next morning he complained to Robinson, a nurse at Lemon Creek, of chest
25 pains and requested his medication. Plaintiff alleges that Robinson did not obtain
26 Murphy's medication and did not follow-up or monitor his condition. Plaintiff alleges that
27 Murphy made two subsequent requests for medication to other Lemon Creek staff
28 members but his requests went unheeded. According to Plaintiff, a Lemon Creek video
shows Murphy collapsing in his cell twenty-six minutes after he first requested his

1 medications from Robinson. He was declared dead about an hour later, after
2 resuscitation efforts failed.

3 **III. DISCUSSION**

4 As part of Plaintiff's 42 U.S.C. § 1983 claim against Robinson, Plaintiff served
5 various requests for production, including the following:

- 6 1) RFP No.1 – production of Robinson's state employee personnel file;
- 7 2) RFP No. 4 – production of any written or recorded statements or
8 communications regarding Joseph Murphy, the death of Joseph Murphy,
9 investigations into the death of Joseph Murphy, or the Department of
10 Corrections's November 13, 2015 Administrative Review by Dean Williams
11 and Joe Hanlon;
- 12 3) RFP No. 7 – production of any writing received or sent by Robinson in
13 which she discusses Joseph Murphy and/or her care and treatment of
14 him.

15 Robinson objected to the three requests based on her right to privacy under
16 AS 39.25.080 and Article I § 22 of the Alaska Constitution and based on medical peer
17 review privilege. After the court's issuance of an order at docket 48 regarding the
18 applicability of AS 39.25.080 to Defendant Corcoran's personnel file, Robinson
19 narrowed the basis of her objection to medical peer review privilege, set forth at
20 AS 18.23.030.

21 The medical peer review privilege statute protects the proceedings of and
22 records generated by a medical peer review organization and protects the investigative
23 process used by the organization.¹ The statute states as follows:

24 (a) Except as provided in (b) of this section, all data and information acquired
25 by a review organization in the exercise of its duties and functions shall be
26 held in confidence and may not be disclosed to anyone except to the extent
27 necessary to carry out the purposes of the review organization and is not
subject to subpoena or discovery. Except as provided in (b) of this section, a

28 ¹See *Mat-Su Valley Med. Ctr., LLC v. Bolinder*, 427 P.3d 754, 763-64 (Alaska 2018).

1 person described in AS 18.23.020 may not disclose what transpired at a
2 meeting of a review organization except to the extent necessary to carry out
3 the purposes of a review organization, and the proceedings and records of a
4 review organization are not subject to discovery or introduction into evidence
5 in a civil action against a health care provider arising out of the matter that is
6 the subject of consideration by the review organization. Information,
7 documents, or records otherwise available from original sources are not
8 immune from discovery or use in a civil action merely because they were
9 presented during proceedings of a review organization, nor may a person who
10 testified before a review organization or who is a member of it be prevented
11 from testifying as to matters within the person's knowledge, but a witness may
12 not be asked about the witness's testimony before a review organization or
13 opinions formed by the witness as a result of its hearings, except as provided
14 in (b) of this section.²

15 Disclosure of information and details deemed confidential under the statute constitutes
16 a misdemeanor.³ The parties agree that the Department of Corrections' peer review
17 committee qualifies as a "review organization" for purposes of the statute.⁴

18 In her response to Plaintiff's motion, Robinson drops her objection to turning over
19 her personnel file for an *in camera* view after confirming that her file does not contain
20 any peer review committee materials. She agrees to produce her personnel file for *in*
21 *camera* review "according to the procedure . . . followed by this Court in regards to
22 Defendant Corcoran's personnel records."⁵

23 She maintains her objection to Plaintiff's RFP No. 4 and RFP No. 7, arguing the
24 medical peer review privilege statute prevents her from fully complying with these two
25 requests, which ask for statements, communications, or writings related to Joseph
26 Murphy, his care, his death, and investigations into his death. She asserts that "[a]ll
27 non-privileged materials responsive to Plaintiff's discovery requests Nos. 4 and 7 that
28 are in Ms. Robinson's care, custody or control, including Mr. Murphy's medical records

²AS 18.23.030(a).

³AS 18.23.040.

⁴The term "review organization" is defined in AS 18.23.070.

⁵Doc. 68 at p. 4.

1 and Ms. Robinson's incident report, have been disclosed by Ms. Robinson,"⁶ but she
2 argues that she cannot turn over other unspecified materials because of the peer review
3 privilege statute.

4 Much of Robinson's briefing is devoted to arguing that Alaska's peer review
5 privilege is applicable in this federal case. She argues that because Alaska criminalizes
6 a violation of the privilege, the issue presented here is different from *Agster v. Maricopa*
7 *County*,⁷ where the Ninth Circuit emphasized that federal common law preempts state
8 law on questions of privilege and declined to create a federal common law privilege for
9 materials related to a peer review conducted by a correctional facility. Even assuming
10 *Agster* is distinguishable and the state statute applies to this case, Robinson has not
11 met her burden to show that her objection to producing the requested materials on the
12 basis of peer review privilege is proper.⁸

13 Despite the protections afforded a medical peer review committee and evidence
14 acquired by a committee, a litigant may nonetheless seek "[i]nformation, documents, or
15 records otherwise available from original sources" or information on matters within an
16 individual's "person[al] knowledge."⁹ However, as the Alaska Supreme Court recently
17 clarified, the litigant must seek such outside evidence from another source and not the
18 committee or a committee member.¹⁰ That is, the committee and its members cannot
19 be forced to turn over evidence in its possession even if the evidence originated outside
20 of the review process; the litigant must instead obtain the evidence elsewhere. Here,
21 Plaintiff is not asking the review committee or any of its members for evidence obtained
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23 ⁶Doc. 68 at pp. 9-10.

24 ⁷422 F.3d 836 (9th Cir. 2005).

25 ⁸Indeed, in its reply brief Plaintiff withdraws the preemption argument from the motion
26 and asserts that it need not be decided at this time.

27 ⁹AS 18.23.030(a).

28 ¹⁰*Mat-Su Valley Medical Center, LLC v. Bolinder*, 427 P.3d 754 (Alaska 2018).

1 for or used in its proceedings, nor is Plaintiff asking Robinson to obtain anything from
2 the committee. Rather, Plaintiff is asking Robinson for any relevant communications
3 that are in her possession, custody, and control.

4 Robinson has not provided any information about the nature of specific materials
5 in her possession which she believes are protected under the statute, and therefore the
6 court cannot craft any specific directive. Instead, the court can only stress that under
7 the statute “[i]nformation, documents, or records otherwise available from original
8 sources are not immune from discovery or use in a civil action merely because they
9 were presented during proceedings of a review organization.”¹¹ Indeed, cases
10 construing similar state statutes explain that information “available from a source other
11 than the committee does not become privileged simply by being acquired by the review
12 committee.”¹² Here, the review committee’s evidence generally consisted of
13 documents, videos, and interviews.¹³ In RFP No. 4 and No. 7 Plaintiff is not asking for
14 videos or information about what Robinson said in her interview; he asks only for written
15 communications. The fact that Robinson may have provided existing communications
16 in her possession to the committee as part of its review does not make them privileged.
17 Robinson has not indicated she has in her possession written testimony or statements
18 she or others prepared specifically for the committee.

19 The statute also prevents disclosure of information about what transpired at a
20 committee meeting or disclosure of committee records and findings. Given that
21 disclosure of confidential information is a misdemeanor, it is unlikely that Robinson has
22 in her possession, custody, or control any materials about the committee meetings or
23 any committee records generated as a result of the review process. Indeed, the
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25 ¹¹AS 18.23.030(a).

26 ¹²*McGee v. Bruce Hosp. Sys.*, 439 S.E.2d 257, 260 (S.C. 1993), *quoted in Mat-Su Valley*
27 *Med. Cent.*, 427 P.3d at 767.

28 ¹³Doc. 69 at p. 2, ¶ 2.

1 affidavit from the Deputy Director of Health and Rehabilitation Services for the
2 Department of Corrections at the time of the peer review states that “[a]ll documents
3 related to the event were stored in the DOC executive Office.”¹⁴ There is nothing to
4 suggest that Robinson has or had any access to these stored materials.

5 IV. CONCLUSION

6 For the reasons above, the motion at docket 53 is granted as follows: (1) The
7 court will conduct an *in camera* review of Robinson’s personnel file on the same
8 conditions and terms set out in its order at docket 48 addressing Defendant Corcoran’s
9 personnel records. (2) Robinson is directed to produce any materials in her possession,
10 custody, or control that are responsive to RFP No. 4 and RFP No. 7 in accordance with
11 the guidance provided herein. In the event Robinson has communications in her
12 custody that she believes are responsive to Plaintiff’s requests but subject to the
13 privilege, she is directed to provide general details about the nature of the
14 communication—what type of communication it is; when it was generated; to whom the
15 communication or statement was provided and when—to Plaintiff and confer with
16 Plaintiff regarding the withheld material. If the parties are unable to reach an agreement
17 on any withheld item, Plaintiff may file a subsequent motion seeking the court’s
18 guidance.

19 Robinson shall deliver the materials for *in camera* review within 14 days.
20 Materials provided on a disk must be accompanied by a paper index describing each
21 item in the manner used by defendant Corcoran.

22 DATED this 19th day of December 2018.

23 /s/ JOHN W. SEDWICK
24 SENIOR JUDGE, UNITED STATES DISTRICT COURT
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28 ¹⁴Doc. 69 at p. 2, ¶ 6.